COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

[Entered January 31, 2003]

Case No. A 0204947
(Judge Davis)

ACADEMY OF MEDICINE OF CINCINNATI, *et al.*,
Plaintiffs,

vs.

AETNA HEALTH, INC., *et al.*,
Defendants.

JUDGMENT ENTRY

This cause came to be heard on the following motions:

- Anthem Blue Cross and Blue Shield's Motion to Compel Arbitration, and to Dismiss or Stay Proceedings, Including a Stay of Discovery (Oral Argument Requested);
- Defendant Aetna Health, Inc.'s Motion to Compel Arbitration and to Stay the Action Pending Arbitration and Motion to Stay Discovery (Oral Argument Requested);
- Humana Health Plan of Ohio, Inc.'s Motion to Compel Arbitration, and to Stay Discovery Pending Resolution of the Arbitration Issue and Motion to Dismiss;
- United Healthcare of Ohio, Inc.'s Motion to Compel Arbitration and to Dismiss or Stay Proceedings, Including Discovery (Oral Argument Requested); and
- Defendants' Joint Alternative Motion to Dismiss and to Stay Discovery (Oral Argument Requested).

Collectively, the foregoing motions are referred to herein as "Defendants' Motions."

This Court FINDS that:

The Defendants' Motions are not well taken and are therefore OVERRULED.

A. Defendants' Motions to Compel Arbitration and Motions to Dismiss or Stay Proceedings, Including Discovery.

The Plaintiffs allege that the Defendants engaged in a conspiracy of price fixing. This dispute does not arise out of or relate to the contracts between the Plaintiffs and Defendants, nor does it involve disputes about the parties' business relationships. The parties never agreed to arbitrate claims that were independent of any breach of contract.

In this case, arbitration is a matter of contract. Considering one party, i.e., the Plaintiffs, is objecting thereto, the court shall not compel an arbitration for a dispute the parties did not agree, in advance, to arbitrate.

B. Defendants' Joint Alternative Motion to Dismiss and to Stay Discovery.

The association Plaintiffs, The Academy of Medicine of Cincinnati and the Butler County Medical Society meet the test set forth in *Hunt v. Washington State Apple Adver. Comm'n* (1977), 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L. Ed.2d 383 for standing as party plaintiffs in the case. It is clear that (1) their members would otherwise have standing to sue in their own right, (2) the interest they seek to protect is germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of their individual members.

The Valentine Act does apply to Plaintiffs' claims. The Valentine Act does not only apply to tangible goods but may

apply to intangibles, such as insurance and services. Therefore, the Valentine Act applies, generally, to trade or commerce, such as physician's reimbursement rates.

The Valentine Act does provide a private right of action for injunctive relief and the court does have the authority to grant the injunctive relief requested by the Plaintiff's, if proven, without having to engage in setting reimbursement rates.

Realizing some of these issues may be subject to appeal, the Court finds that there is no just reason for delay.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, THAT:

Defendants' Motions are overruled.

Pursuant to Ohio R.Civ.P. 12(A)(2), Defendants are not required to respond to the Amended Complaint until fourteen (14) days after the date this Judgment Entry is entered.

This matter is rescheduled for a status report on February 26, 2003 at 8:30 a.m.

IT IS SO ORDERED.

Jan. 31, 2003
Date

/s/
David P. Davis, Judge
Hamilton County Court of
Common Pleas

AGREED TO AS TO FORM BY:

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IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

[Entered November 21, 2003

APPEAL NOS. C-030109
C-030110
C-030111
TRIAL NO. A-0204947

ACADEMY OF MEDICINE OF CINCINNATI, LUIS PAGANI, M.D., BUTLER COUNTY MEDICAL SOCIETY, PAUL JENNEWINE, M.D., BRADFORD H. WOODALL, M.D., WILLIAM RANDALL COX, M.D., and NEWTON H. BULLARD, M.D.,
Plaintiffs-Appellees,

vs.

AETNA HEALTH, INC., COMMUNITY INSURANCE COMPANY d/b/a ANTHEM BLUE CROSS AND BLUE SHIELD, and UNITED HEALTHCARE OF OHIO, INC.,
Defendants-Appellants,

and

HUMANA HEALTH PLAN OF OHIO, INC.,
Defendant.

DECISION

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: November 21, 2003

Strauss & Troy, Richard S. Wayne, Joseph J. Braun, and Barrett & Weber, LPA, and *Michael R. Barrett, and Waite, Schneider, Bayless & Chesley Co., L.P.A., Stanley M. Chesley, Terrence L. Goodman* and *Jean M. Geoppinger*, for Plaintiffs-Appellees,

Hahn Loeser & Parks, LLP, and *Robert J. Fogarty,* for Defendant-Appellant Aetna Health, Inc,

Frost Brown Todd, LLC, and *James R. Adams*, for Defendant-Appellant Community Insurance Company d/b/a Anthem Blue Cross & Blue Shield,

Thompson Hine and *Stephen J. Butler*, for Defendant-Appellant United Healthcare of Ohio, Inc.

Please note: We have sua sponte removed this case from the accelerated calendar.

Per Curiam.

{¶1} Plaintiffs-appellees, medical doctors practicing i the greater Cincinnati, Ohio, area and two nonprofit medica societies representing the doctors, sued defendant-appellants Aetna Health, Inc. ("Aetna"), Anthem Blue Cross and Blu Shield ("Anthem"), and United Healthcare of Ohio, Inc ("United"), three managed health-care organizations ("th HMOs"), for violations of the antitrust provisions in Ohio' Valentine Act, R.C. Chapter 1331. The doctors alleged tha the HMOs had conspired to fix and lower the insuranc reimbursement rates paid to hospitals and medical practi- tioners in the geographic region consisting of the followin counties in Ohio: Hamilton, Clermont, Warren and Butler. I response to the complaint, each HMO moved to stay the proceedings in the trial court and to compel arbitration of the antitrust claims. The trial court denied the motions, statin that the dispute (conspiracy to engage in price fixing) did no arise out of or relate to the provider agreements between the parties, and that the "parties [had] never agreed to arbitrate claims that were independent of any, breach of contract." Each HMO has timely appealed that decision.[2] We have consolidated the appeals for purposes of this decision.

{¶2} Aetna, Anthem and United each assign as error the trial court's denial of their motions to compel arbitration and to stay proceedings in the trial court. Prior to discussing these assignments of error, we note that all the parties agree that a valid arbitration clause existed in each of the HMOs' contracts with the plaintiff doctors. The similarly worded

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[1] Defendant Humana Health Plan of Ohio, Inc., ("Humana") originally filed a notice of appeal and an appellate brief in connection with this case. Because Humana voluntarily dismissed its appeal after oral arguments were held, we do not address its assignments of error.

[2] Pursuant to R.C. 2711.02(C), an order that denies a stay of the trial of any action pending arbitration is a final order that may be appealed.

arbitration or alternative-dispute-resolution clause contained in each of the HMOs' contracts with the regional hospitals and medical practitioners stated that "any disputes arising out of or relating" to the provider agreement or "business relationship" had to be resolved through arbitration, mediation or some form of alternative dispute resolution. The HMOs argue that the antitrust claims were within the scope of the arbitration provisions in the provider agreements. We disagree and thus affirm the judgment of the trial court.

{¶3} As this court has outlined before, "the Ohio Supreme Court has adopted four rules, common to both state and federal courts, for reviewing decisions concerning a dispute's arbitrability: (1) that 'arbitration is a matter of contract and a party cannot be required to so submit to arbitration any dispute which he has not agreed to so submit'; (2) that the question whether a particular claim is arbitrable is one of law for the court to decide, (3) that when deciding whether the parties have agreed to submit a particular claim to arbitration, a court may not rule on the potential merits of the underlying claim; and (4) that when a contract contains an arbitration provision, there is a presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'"[3]

{¶4} Here, the parties' dispute centers on whether the HMOs conspired and/or colluded to set reimbursement rates in this region that were lower than the "prevailing reimbursement rates in other comparable Ohio health care markets

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[3] *Cohen v. Painewebber, Inc.*, 1st Dist. No. C-010312, 2002-Ohio-196, *citing Council of Smaller Enterprises v. Gates, McDonald & Co.* (1998), 80 Ohio St.3d 661, 665-666, 687 N.E.2d 1351, citing *AT & T Technologies, Inc. v. Communications Workers of Am.* (1986), 475 U.S. 643, 643-650, 106 S.Ct. 1415, quoting *Steelworkers v. Am. Mfg. Co.* (1960), 363 U.S. 564, 80 S.Ct. 1343.

such as Dayton, Columbus and Cleveland." In determining whether this claim was within the scope of the arbitration agreements, "a proper method of analysis here is to ask if [this] action could be maintained without reference to the [provider agreement] or [business] relationship at issue. If it could, it is likely outside the scope of the arbitration agreement."[4]

{¶5} After reviewing the complaint and the remainder of the record, we conclude that the doctors' antitrust claim could be maintained without reference to their individual provider agreements. To maintain an antitrust claim pursuant to R.C. Chapter 1331, the doctors have to prove that two or more persons came together to illegally concentrate a particular business into the hands of a few for the purpose of controlling prices, and that injury resulted from that restraint of trade.[5] The express elements of an antitrust claim do not depend, as a matter of law, on the provider agreements between the individual doctors and HMOs.

{¶6} The doctors' allegations in their complaint – (1) that the HMOs conspired and/or colluded with one another to illegally lower and fix the reimbursement rates for medical procedures to medical practitioners in the region; (2) that this anticompetitive behavior caused a decline in the number of doctors willing to practice medicine here, which resulted in the number of hospitals and hospital beds available for patient care dropping by nearly fifty percent and a decline in the quality of health care available for the consumer; and (3) that the HMOs' anti-competitive behavior precipitated a drop in physicians' salaries in the area – neither relied on nor

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[4] *Fazio v. Lehman Brothers, Inc.* (C.A.6, 2003), 340 F.3d 386, 395, citing *Ford v. NYLCare Health Plans of Gulf Coast, Inc.*, (C.A.5, 1998), 141 F.3d 243, 2513-51.

[5] See *Schweizer v. Riverside Methodist Hospitals* (1996), 108 Ohio App.3d 539, 543, 671 N.E.2d 312.

referred to a contract or a provider agreement between the doctors and the HMOs. Instead, the antitrust claim was based upon a statutory remedy the legislature has provided to persons harmed by illegal price fixing. The allegations that the HMOs, which controlled a majority of the health-care market in this region, colluded to fix reimbursement rates to medical practitioners arose out of actions that occurred prior to the existence of the underlying provider agreements or business relationships between the doctors and HMOs. The allegations did not even presume the existence of an underlying provider agreement.

{¶7} Because the doctors' cause of action could be maintained without reference to the individual provider agreements, we hold that the antitrust claims were not subject to the arbitration provision in the provider agreements. Accordingly, the trial court did not err in refusing to compel arbitration. Pursuant to this holding, the issue of whether the trial court erred in failing to stay the proceedings is now moot. The HMOs' assignment of error is overruled, and the judgment of the trial court is affirmed.

Judgment affirmed.

SUNDERMANN, P.J., HILDEBRANDT and WINKLER, JJ.

Please Note:

The court has placed of record its own entry in this case on the date of the release of this Decision.

ACADEMY OF MEDICINE OF CINCINNATI ET AL., APPELLEES, *v.* AETNA HEALTH, INC. ET AL.; UNITED HEALTHCARE OF OHIO, APPELLANT.
[Cite as *Academy of Medicine of Cincinnati v. Aetna Health, Inc.*, 108 Ohio St.3d 185, 2006-Ohio-657.]

Contracts—Arbitration clause—Antitrust claims—Standard of review for determining whether cause of action is within scope of contract clause requiring arbitration of disputes.

(No. 2004-0001—Submitted February 2, 2005—Decided March 1, 2006.) APPEAL from the Court of Appeals for Hamilton County, Nos. C-030109, C-030110, and C-03011, 155 Ohio App.3d 310, 2003-Ohio-6194.

PFEIFER, J.

Factual and Procedural Background

{¶ 1} Plaintiffs-appellees, Academy of Medicine of Cincinnati, Butler County Medical Society, Luis Pagani, M.D., Paul Jennewine, M.D., Bradford H. Woodall, M.D., William Randall Cox, M.D., and Newton H. Bullard, M.D., allege that defendant-appellant, United Healthcare of Ohio ("United"), one of the largest providers of group health-insurance policies in Hamilton, Warren, Clermont, and Butler Counties, engaged in a conspiracy with other such providers to maintain artificially low reimbursement rates paid to physicians in the region in violation of the antitrust provisions of the Valentine Act, R.C. Chapter 1331.

{¶ 2} In response to appellees' complaint filed in Hamilton County Common Pleas Court, appellant moved to stay the trial court proceedings and compel arbitration of the antitrust claims. The motion was based on the arbitration clause in the physician-appellees' provider agreements with appellant. The clause requires binding arbitration of disputes "about [the parties'] business relationship."

{¶ 3} The trial court denied the motion to stay and to compel arbitration, reasoning that since the plaintiffs alleged a conspiracy of price fixing by the defendant and other providers, that dispute "[did] not arise out of or relate to the contracts between the Plaintiffs and Defendant[ ], nor [did] it involve disputes about the parties' business relationships." The court found that "[t]he parties never agreed to arbitrate claims that were independent of any breach of contract."

{¶ 4} The court of appeals affirmed the trial court, finding that the appellees' antitrust claims were not within the scope of the arbitration provisions in the provider agreements. Relying on this court's decision in *Council of Smaller Enterprises v. Gates, McDonald & Co.* (1998), 80 Ohio St.3d 661, 687 N.E.2d 1352, the appellate court set forth the test for determining the arbitrability of a given dispute:

{¶ 5} " '[T]he Ohio Supreme Court has adopted four rules, common to both state and federal courts, for reviewing decisions concerning a dispute's "arbitrability": (1) that "arbitration is a matter of contract and a party cannot be required to so submit to arbitration any dispute which he has not agreed to so submit"; (2) that the question whether a particular claim is arbitrable is one of law for the court to decide; (3) that when deciding whether the parties have agreed to submit a particular claim to arbitration, a court may not rule on the potential merits of the underlying claim; and (4) that when a "contract contains an arbitration provision, there is a presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.' " ' " 155 Ohio App.3d 310, 2003-Ohio-6194, 800 N.E.2d 1185, ¶ 12, quoting *Cohen v. PaineWebber, Inc.*, Hamilton App. No. C-010312, 2002 WL 63578, quoting *Council of Smaller Enterprises*, 80 Ohio St.3d at 665-666, 687 N.E.2d 1352, quoting *AT & T Technologies,*

Inc. v. Communications Workers of Am. (1986), 475 U.S 643, 650, 106 S.Ct. 1415, 89 L.Ed.2d 648.

{¶ 6} This case revolves around the application of the first rule enunciated in *Council of Smaller Enterprises*, i.e. whether the parties agreed to submit the dispute at issue to arbitration. In determining whether a claim based upon an alleged conspiracy to set artificially low reimbursement rates was within the scope of the arbitration agreements between the parties in this case, the appellate court relied upon a federal case, *Fazio v. Lehman Bros., Inc.* (C.A.6, 2003), 340 F.3d 386. In *Fazio*, the Sixth Circuit Court of Appeals held that "a proper method of analysis * * * is to ask if an action could be maintained without reference to the contract or relationship at issue. If it could, it is likely outside the scope of the arbitration agreement." Id. at 395, citing *Ford v. NYLCare Health Plans of Gulf Coast, Inc.* (C.A.5, 1998), 141 F.3d 243, 250-251.

{¶ 7} Applying *Fazio*, the appellate court concluded that "the doctors' antitrust claim could be maintained without reference to their individual provider agreements." 155 Ohio App.3d 310, 2003-Ohio-6194, 800 N.E.2d 1185, ¶ 5. The court found that "[t]he allegations that the HMOs, which controlled a majority of the health-care market in this region, colluded to fix reimbursement rates to medical practitioners arose out of actions that occurred prior to the existence of the underlying provider agreements or business relationships between the doctors and HMOs. The allegations did not even presume the existence of an underlying provider agreement." Id. at ¶ 6.

{¶ 8} Since the court found that the doctors' cause of action could be maintained without reference to the individual provider agreements, it held that the antitrust claims were not subject to the arbitration provision in the provider agreements.

{¶ 9} Appellant appealed. This court granted appellant's jurisdictional motion on a limited basis, ordering briefing only on the following issue: "In determining whether a cause of action is within the scope of an arbitration agreement, may a state court in Ohio base that determination on a federal standard that inquires whether the 'action could be maintained without reference to the contract or relationship at issue?' *Fazio v. Lehman Bros., Inc.* (C.A.6, 2003), 340 F.3d 386, 395, citing *Ford v. NYLCare Health Plans of Gulf Coast, Inc.* (C.A.5, 1998), 141 F.3d 243, 250-251." 102 Ohio St.3d 1407, 2004-Ohio-1860, 806 N.E.2d 559.

Law and Analysis

{¶ 10} "Ohio and federal courts encourage arbitration to settle disputes," *ABM Farms, Inc. v. Woods* (1998), 81 Ohio St.3d 498, 500, 692 N.E.2d 574, and Ohio has generally relied at least in part on federal law in developing its own jurisprudence. This court enunciated the four principles that guide determinations of arbitrability in *Council of Smaller Enterprises v. Gates, McDonald & Co.*, 80 Ohio St.3d 661, 687 N.E.2d 1352, relying heavily on *AT & T Technologies*, 475 U.S. 643, 106 S.Ct. 1415, 89 L.Ed.2d 648. This court held:

{¶ 11} "The first principle is that ' "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." * * * This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed to submit such grievances to arbitration.' *AT & T Technologies*, 475 U.S. at 648-649, 106 S.Ct. at 1418, 89 L.Ed.2d at 655, quoting [*United Steelworkers of Am. v.*] *Warrior & Gulf* [*Navigation Co.* (1960)], 363 U.S. [574] at 582, 80 S.Ct. [1347] at 1353, 4 L.Ed.2d [1409] at 1417.

{¶ 12} "The second principle is that 'the question o arbitrability—whether a[n] * * * agreement creates a duty fo the parties to arbitrate the particular grievance—is undeniabl an issue for judicial determination. Unless the parties clearl and unmistakably provide otherwise, the question of whethe the parties agreed to arbitrate is to be decided by the court not the arbitrator.' *Id.*, 475 U.S. at 649, 106 S.Ct. at 1418, 8 L.Ed.2d at 656.

{¶ 13} "The third rule is, 'in deciding whether the partie have agreed to submit a particular grievance to arbitration, court is not to rule on the potential merits of the underlyin claims.' *Id.*, 475 U.S. at 649, 106 S.Ct. at 1419, 89 L.Ed.2d a 656.

{¶ 14} "The fourth principle is that 'where the contrac contains an arbitration clause, there is a presumption o arbitrability in the sense that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." ' *Id.*, 475 U.S. at 650, 106 S.Ct. at 1419, 89 L.Ed.2d at 656, quoting *Warrior & Gulf*, *supra*, 363 U.S. at 582-588, 80 S.Ct at 1353, 4 L.Ed.2d at 1417." *Council of Smaller Enterprises*, 80 Ohio St.3d at 665-666, 687 N.E.2d 1352.

{¶ 15} Thus, with its reliance on federal precedent, this court has itself abundantly shown that a state court may rely on a federal standard in applying Ohio law on the issue o arbitrability. However, that standard must be consistent with Ohio law and must reflect a correct statement of the applicable federal jurisprudence. The appellate court's reliance on *Fazio* is appropriate in both regards.

{¶ 16} The only issue before us is whether the court of appeals employed a proper test for determining the scope of the arbitration clause at issue, i.e., whether the parties agreed

to submit this dispute to arbitration. "An arbitration clause in a contract is generally viewed as an expression that the parties agree to arbitrate disagreements within the scope of the arbitration clause, and, with limited exceptions, an arbitration clause is to be upheld just as any other provision in a contract should be respected." *Williams v. Aetna Fin. Co.* (1998), 83 Ohio St.3d 464, 471, 700 N.E.2d 859.

{¶ 17} We look first to whether the arbitration clause itself or the statute at issue contains limitations as to arbitrability. Had the parties removed statutory claims from the scope of the arbitration provision, or had the General Assembly "evinced an intention to preclude a waiver of judicial remedies for the statutory rights" created by the Valentine Act, appellee's claims could not have been within the scope of the arbitration agreement. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985), 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444. However, the arbitration clause at issue does not remove statutory claims from the scope of the agreement, and the Valentine Act does not preclude a waiver of judicial remedies for the rights it creates.

{¶ 18} Our next consideration is whether the arbitration clause limits itself only to certain aspects of the underlying contract. "To determine whether the claims asserted in the complaint fall within the scope of an arbitration clause, the Court must 'classify the particular clause as either broad or narrow.' *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.*, 252 F.3d 218, 224 (2d Cir.2001). An arbitration clause that contains the phrase 'any claim or controversy arising out of or relating to the agreement' is considered 'the paradigm of a broad clause.' *Collins & Aikman Prods. Co. v. Bldg. Sys. Inc.*, 58 F.3d 16, 20 (2d Cir.1995)." *ADR/JB, Corp. v. MCY III, Inc.* (E.D.N.Y.2004), 299 F.Supp.2d 110, 114. The arbitration provision in this case purports to cover any disputes about the parties' business relationship and must be considered a broad clause.

{¶ 19} Arbitration is not limited to claims alleging a breach of contract, and creative pleading of claims as something other than contractual cannot overcome a broad arbitration provision. The overarching issue is whether the parties agreed to arbitrate the issue. *Mitsubishi*, 473 U.S. at 626, 105 S.Ct. 3346, 87 L.Ed.2d 444. "There is no reason to depart from these guidelines where a party bound by an arbitration agreement raises claims founded on statutory rights." Id. In *Mitsubishi*, the court found that an agreement to arbitrate antitrust claims is not void as against public policy. Id. at 632-636, 105 S.Ct. 3346, 87 L.Ed.2d 444.

{¶ 20} *Mitsubishi* does not make every antitrust claim arbitrable between parties to an arbitration agreement. Statutory claims, including antitrust claims, are neither per se arbitrable or not arbitrable. Those claims must undergo the analysis that every other claim faces: whether the parties agreed to arbitrate the issue. In *Mitsubishi*, the lower court had found (and the plaintiff did not dispute on appeal) that each element in the mix of allegations that yielded the plaintiff's antitrust claim individually implicated a provision of the sales procedure agreement between the plaintiff and Mitsubishi. *Id.* at 622, 105 S.Ct. 3346, 87 L.Ed.2d 444, fn. 9.

{¶ 21} In *Coors Brewing Co. v. Molson Breweries* (C.A.10, 1995), 51 F.3d 1511, the court concluded that although the arbitration clause at issue encompassed antitrust claims generally, some of the antitrust causes of action Coors Brewing Company brought against Molson Breweries of Canada Limited were outside the scope of the contract between the two companies. In that case, Coors had a licensing agreement under which Molson would brew and distribute Coors products in Canada. Later, Miller Brewing Company entered into a partnership with Molson, making Molson the exclusive distributor of Miller products in Canada, and Miller the exclusive distributor of Molson products in the United States. Coors alleged, among other

things, that the Miller-Molson alliance was a combination in restraint of trade, lessening competition in the United States and North American beer markets. The *Coors* court found that Coors could litigate any antitrust claims against Molson not related to its licensing agreement, just as anyone else with standing could. Id. at 1517. The existence of a contractual relationship between Coors and Molson did not mean that every conceivable claim between the two was arbitrable.

{¶ 22} The *Coors* court points out the absurdity of a contrary holding:

{¶ 23} "A dispute within the scope of the contract is still a condition precedent to the involuntary arbitration of antitrust claims. * * * A contrary reading of *Mitsubishi* not only ignores the facts of that case, but also could lead to absurd results. For example, if two small business owners execute a sales contract including a general arbitration clause, and one assaults the other, we would think it elementary that the sales contract did not require the victim to arbitrate the tort claim because the tort claim is not related to the sales contract. In other words, with respect to the alleged wrong, it is simply fortuitous that the parties happened to have a contractual relationship." 51 F.3d at 1516.

{¶ 24} The *Fazio* test applied by the court below helps determine whether the contractual relationship between parties is irrelevant or controlling. Since courts must sift through pleadings to determine whether a cause of action labeled as a tort or statutory claim is essentially a cause of action based upon the contract, we agree with *Fazio* that "a proper method of analysis * * * is to ask if an action could be maintained without reference to the contract or relationship at issue." Id., 340 F.3d at 395.

{¶ 25} The facts of *Fazio* itself demonstrate that its rule is consistent with a policy favoring arbitration. In *Fazio*, a Cleveland stockbroker, Frank Gruttadauria, had misappro-

priated at least $54 million of his clients' money. He had sen falsified statements to clients overstating the value of thei accounts, covering up significant losses. When clients with drew money from their inflated accounts, Gruttadauria woul take money from other clients' accounts to make payments. Eventually, Gruttadauria's clients' accounts had a paper valu of $278 million, but an actual value of only $1.8 million.

{¶ 26} His clients brought causes of action against th brokerage houses for which he had worked. They alleged numerous securities laws violations, including theft, as well as churning, unauthorized trading, and excessive risk taking. The brokerage houses sought to compel arbitration. All of th plaintiffs were subject to broadly worded arbitration clauses.

{¶ 27} The lower court found that the allegation of theft placed the dispute outside the scope of the arbitration provision because Gruttadauria's conduct was so beyond what is expected of a broker that it could not have been within the reasonable contemplation of the plaintiffs when they signed their agreements.

{¶ 28} The appellate court, however, found that the fraudulent activities were a violation of the account agreements and arose out of activities contemplated by those agreements. "The lawsuit by necessity must describe why Gruttadauria was in control of the plaintiffs' money and what the brokerage houses' obligations were. The plaintiffs therefore cannot maintain their action without reference to the account agreements, and accordingly, this action is covered by the arbitration clauses." Id., 340 F.3d at 395.

{¶ 29} The *Fazio* test does not act as a detriment to arbitration. It functions as a tool to determine a key question of arbitrability—whether the parties agreed to arbitrate the question at issue. It prevents the absurdity of an arbitration clause barring a party to the agreement from litigating any matter against the other party, regardless of how unrelated to

the subject of the agreement. It allows courts to make determinations of arbitrability based upon the factual allegations in the complaint instead of on the legal theories presented. It also establishes that the existence of a contract between the parties does not mean that every dispute between the parties is arbitrable.

{¶ 30} We find that the *Fazio* test is consistent with Ohio law and is not contrary to federal law on the issue of arbitrability. We therefore find that in determining whether a cause of action is within the scope of an arbitration agreement, a state court in Ohio may base that determination on a federal standard that inquires whether the action could be maintained without reference to the contract or relationship at issue.

Judgment affirmed.

MOYER, C.J., RESNICK, O'CONNOR and O'DONNELL, JJ., concur.

LUNDBERG STRATTON and LANZINGER, JJ., dissent.

LANZINGER, J., dissenting.

{¶ 31} I agree that a state court may determine whether a claim is within an arbitration agreement using a federal standard as long as that standard itself is stated correctly and is consistent with Ohio law. Yet because, in my view, the appellate court mischaracterized the federal standard and, by holding that the antitrust claims were not subject to arbitration, minimized Ohio's policy favoring arbitration, I respectfully dissent.

{¶ 32} The majority twice cites the four rules of *Council of Smaller Enterprises v. Gates, McDonald & Co.* (1998), 80 Ohio St.3d 661, 687 N.E.2d 1352, relating to when arbitration may be compelled, but focuses solely on the first point, the parties' intent to arbitrate. Although indeed the parties cannot

be forced to arbitrate unless they have agreed to do so, ir Ohio there is a presumption of arbitrability when a contrac contains an arbitration clause, especially when the clause is broad in scope. Id. at 666-667, 687 N.E.2d 1352. The clause requiring arbitration or alternative dispute resolution contained within the United Healthcare of Ohio provider agreements is broad, covering as it does any dispute "abou [the parties'] business relationship."

{¶ 33} The case relied on by the appellate court, *Fazio v. Lehman Bros., Inc.* (C.A.6, 2003), 340 F.3d 386, determined that allegations of securities violations were within the scope of an agreement containing an arbitration clause even though the thefts themselves were unrelated to what was expected of a broker. Because the theft claims arose out of activities contemplated by the account agreements, they were subject to arbitration. Id. at 395.

{¶ 34} *Fazio*'s suggestion that courts ask whether the claim could be maintained without reference to the agreements is a preliminary rather than a defining matter and should be put into context within the entire paragraph:

{¶ 35} "District courts have the authority to decide, as a threshold matter, whether an issue is within the scope of an arbitration agreement. *Stout [v. J.D. Byrider* (C.A.6, 2000)], 228 FM [709] at 714. A proper method of analysis here is to ask if an action could be maintained without reference to the contract or relationship at issue. If it could, it is likely outside the scope of the arbitration agreement. *Ford v. NYLCare Health Plans of Gulf Coast, Inc.*, 141 F.3d 243, 250-51 (5th Cir. 1998) (applying Texas arbitration law under a choice of law provision). Torts may often fall into this category, but merely casting a complaint in tort does not mean that the arbitration provision does not apply. *Fyrneties (Hong Kong) Ltd, v. Quantum Group, Inc.*, 293 F.3d 1023, 1030 (7th Cir.2002). *Even real torts can be covered by arbitration clauses 'if the allegations underlying the claims "touch*

matters" covered by the (agreement].' Genesco, Inc. v. T. Kakiuchi & Co., Ltd., 815 F.2d 840, 846 (2d Cir.1987). We are, however, aware of the Supreme Court's warning against 'forcing unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.' *First Options [of Chicago, Inc. v. Kaplan* (1995)], 514 U.S. [938] at 945 [115 S.Ct. 1920, 131 L.Ed.2d 985]." (Emphasis added.) *Fazio*, 340 F.3d at 395.

{¶ 36} Thus, *Fazio* recognized the true federal standard to be whether allegations "touch matters" covered by the agreement. Not only tort claims may be covered by an agreement. Statutory antitrust claims have been compelled to face arbitration. As the United States Supreme Court noted in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985), 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444, "the exclusion of some areas of possible dispute from the scope of an arbitration clause does not serve to restrict the reach of an otherwise broad clause in the areas in which it was intended to operate. Thus, insofar as the allegations underlying the statutory claims touch matters covered by the enumerated articles, the Court of Appeals properly resolved any doubts in favor of arbitrability." Id. at 625, 105 S.Ct. 3346, 87 L.Ed.2d 444, fn. 13.

{¶ 37} Federal policy strongly favors enforcement of arbitration agreements. See Section 2, Title 9, U.S.Code. In fact, in light of this strong federal policy, the existence of a broad agreement to arbitrate creates a presumption of arbitrability that may be overcome only if "it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.* (1960), 363 U.S. 574, 583-584, 80 S.Ct 1347, 4 L.Ed.2d 1409. See, also, *Smith/Enron Cogeneration Ltd. Partnership v. Smith Cogeneration Internatl., Inc.* (C.A.2, 1999), 198 F.3d 88, 99; *Air Line Pilots*

Assn. v. Fed. Express Corp. (C.A.D.C.2005), 402 F.3d 1245 1248; *Washington Square Securities, Inc. v. Aune* (C.A.4 2004), 385 F.3d 432, 436; *Inlandboatmens Union of the Pacific v. Dutra Group* (C.A.9, 2002), 279 F.3d 1075, 1078.

{¶ 38} Even if we were to apply the standard mistakenly used by the appellate court, it is difficult to see how antitrust actions may be maintained against the HMO provider "without reference to" the individual provider agreements. *Fazio*, 340 F.3d at 395. The provider agreements constitute the alleged anticompetitive instruments that give the physicians standing to sue. See *Schweizer v. Riverside Methodist Hosps.* (1996), 108 Ohio App.3d 539, 543-544, 671 N.E.2d 312. They are at the core of the Valentine Act claims, for they allegedly contain the evidence of anti-competitive conduct and financial harm. They contain the reimbursement rates allegedly implicating unlawful restraint. The antitrust conspiracy claims relate to the provider contracts that contain the broad clauses requiring arbitration of any dispute "about the business relationship" between the physicians and United Healthcare.

{¶ 39} In short, the *Council of Smaller Enterprises* test, properly applied, calls for arbitration of these claims. The reference test adopted by the court of appeals, asking whether the action could be maintained without reference to the contract, is not consistent with either the federal policy or Ohio's policy of favoring arbitration. The appropriate federal standard is whether allegations underlying the claims "touch matters" covered by the agreements. Because I believe they do in this case, I respectfully dissent.

{¶ 40} I would hold that in determining whether a claim is within the scope of an arbitration agreement, a state court in Ohio may base that determination on a federal standard that inquires whether the allegations underlying the claims touch matters covered by the agreement. I would further stay any

claims of the nonsignatory medical societies pending completion of the arbitration.

LUNDBERG STRATTON, J., concurs in the foregoing dissenting opinion.

Waite, Schneider, Bayless & Chesley Co., L.P.A., Stanley M. Chesley, Paul M. DeMarco, Terrence L. Goodman, and Jean M. Goeppinger; Strauss & Troy, Richard S. Wayne, Thomas P. Glass, Joseph J. Braun, and Nicole M. Lundrigan; Barrett & Weber, L.P.A., and Michael R. Barrett, for appellees.

Thompson Hine and Stephen J. Butler; Weil, Gotshal & Manges, L.L.P., Gregory S. Coleman, Debra J. Pearlstein, and Elizabeth M. Avery, for appellant.

Tucker Ellis & West, L.L.P., and Irene C. Keyse-Walker, urging reversal for amicus curiae America's Health Insurance Plans.

Issac, Brant, Ledman & Teetor, L.L.P., and Mark Landes, urging reversal for amicus curiae Ohio Manufacturers' Association.

C. Luther Heckman, urging reversal for amicus curiae Ohio Council of Retail Merchants.

Rich, Crites & Wesp, L.L.C., and E. Joel Wesp; Cooper & Kirk, P.L.L.C., David H. Thompson, and Charles J. Cooper; National Chamber Litigation Center, Inc., Robin S. Conrad, and Stephanie A. Martz, urging reversal for amici curiae United States Chamber of Commerce and Ohio Chamber of Commerce.

THE SUPREME COURT OF OHIO

[Filed April 26, 2006

Case No. 04-1
Hamilton County

Academy of Medicine of Cincinnati,
Luis Pagani, M.D., et al.

v.

Aetna Health, Inc., Community Ins. Col, d.b.a.
Blue Cross etc. et al., and Humana Health Plan of Ohio, Inc.

RECONSIDERATION ENTRY

IT IS ORDERED by the Court that the motion for reconsideration in this case is denied.

(Hamilton County Court of Appeals; Nos. C030109, C030110, and C030111)

/s/
THOMAS J. MOYER
Chief Justice

OHIO REVISED CODE ANNOTATED
TITLE XIII. COMMERCIAL TRANSACTIONS
CHAPTER 1331. MONOPOLIES
RESTRAINTS OF TRADE

§1331.01 Definitions

As used in sections 1331.01 to 1331.14 of the Revised Code:

(A) "Person" includes corporations, partnerships, and associations existing under or authorized by any state or territory of the United States, and solely for the purpose of the definition of division (B) of this section, a foreign governmental entity.

(B) "Trust" is a combination of capital, skill, or acts by two or more persons for any of the following purposes:

(1) To create or carry out restrictions in trade or commerce;

(2) To limit or reduce the production, or increase or reduce the price of merchandise or a commodity;

(3) To prevent competition in manufacturing, making, transportation, sale, or purchase of merchandise, produce, or a commodity;

(4) To fix at a standard or figure, whereby its price to the public or consumer is in any manner controlled or established, an article or commodity of merchandise, produce, or commerce intended for sale, barter, use, or consumption in this state;

(5) To make, enter into, execute, or carry out contracts, obligations, or agreements of any kind by which they bind or have bound themselves not to sell, dispose of, or transport an article or commodity, or an article of trade, use, merchandise, commerce, or consumption below a common standard figure or fixed value, or by which they agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graduated figure, or by which they shall in any

manner establish or settle the price of an article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, purchasers, or consumers in the sale or transportation of such article or commodity, or by which they agree to pool, combine, or directly or indirectly unite any interests which they have connected with the sale or transportation of such article or commodity, that its price might in any manner be affected;

(6) To refuse to buy from, sell to, or trade with any person because such person appears on a blacklist issued by, or is being boycotted by, any foreign corporate or governmental entity.

"Trust," as defined in this section, does not include bargaining by a labor organization in negotiating or effecting contracts with an employer or employer group with reference to minimum payment to any member of the labor organization for any motor vehicles owned, driven, and used exclusively by such member in the performance of his duties of employment pursuant to a collective bargaining agreement between the labor organization and the employer or employer group.

A trust as defined in division (B) of this section is unlawful and void.

OHIO REVISED CODE ANNOTATED
TITLE XIII. COMMERCIAL TRANSACTIONS
CHAPTER 1331. MONOPOLIES
RESTRAINTS OF TRADE

§1331.04 Conspiracy against trade prohibited

A violation of sections 1331.01 to 1331.14, inclusive, of the Revised Code, is a conspiracy against trade. No person shall engage in such conspiracy or take part therein, or aid or advise in its commission, or, as principal, manager, director, agent, servant, or employer, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, or rates, or furnish any information to assist in carrying out such purposes, or orders thereunder, or in pursuance thereof, or in any manner violate said sections. Each day's violation of this section is a separate offense.